The Rt. Hon. Lord Reed

President of the Supreme Court of the United Kingdom

Postscript to Response to a Call for Evidence produced by the Independent Human Rights Act Review

1. I have already responded on behalf of the Supreme Court to the call for evidence produced by the Independent Human Rights Act Review. This is a postscript to that response, which seeks to situate my consideration of the operation of the Human Rights Act 1998 ("**HRA**") within a wider constitutional context. I would be grateful if the Panel would take these additional comments into account.

2. My comments are relevant to both themes set out in the call for evidence. First, in order to assess the relationship between domestic courts and the European Court of Human Rights ("**ECtHR**") (theme one), it is important to understand that in both Strasbourg and the United Kingdom the Convention is treated as subsidiary to the more detailed body of domestic law that protects human rights. It would be wrong to characterise the ECtHR as imposing a wholly foreign set of rules, principles and values on the domestic courts, without regard to the position in domestic law. Secondly, in order to assess the impact of the HRA on the relationship between the judiciary, the executive and the legislature (theme two), it is important to understand that human rights protections have affected that relationship for many centuries, through the enactment of legislation by Parliament and through the courts' application and development of the common law. The protection of human rights in the United Kingdom does not begin and end with the HRA.

3. The domestic law of the United Kingdom has protected human rights more consistently, and over a longer period of time, than perhaps any other legal system. The independence of the judiciary has been protected by statute since the end of the seventeenth century and the

beginning of the eighteenth.[1] Habeas corpus in England is of course much older.[2] Much of our law of criminal evidence and procedure has its roots far in the past, and has been designed to ensure a fair trial. Our law of tort is designed to protect people's bodily integrity, their reputation, and their freedom to live free of unlawful interference of all kinds. Our law of property protects their possessions.[3] Freedom from illegal searches of premises or correspondence has been protected under the common law since the eighteenth century case of *Entick v Carrington*.[4] Clearly, the protection of human rights is not alien to us: it is deeply embedded in our legal and political culture.

4. Our domestic tradition was not supplanted in 1998 by the enactment of the HRA. In fact, some of the most important human rights cases of modern times have been concerned with the common law.

5. One such case is *R (Daly) v Secretary of State for the Home Department*[5], which concerned a policy that prisoners should be absent from their cells while they were being searched for contraband, as applied to a prisoner who had correspondence with his solicitor in his cell. This was held to be unlawful on the ground that it infringed the prisoner's common law right that the confidentiality of privileged legal correspondence be maintained. Lord Bingham noted in the final paragraph of his speech that that result was compatible with article 8 of the Convention. In that regard he adopted the observations of Lord Cooke, formerly the President of the Court of Appeal of New Zealand, who said:

[1] Those statutes were the Bill of Rights 1689 (1 Will & Mary, Sess 2, c 2) and the Act of Settlement 1701 in England and Wales (12 & 13 Will 3, c 2), the Claim of Right 1689 in Scotland, and the Acts of Union 1706 (6 Anne c 11) and 1707 in England and Wales and in Scotland respectively. See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 at [41]-[42].

[2] Although the substantive remedy of habeas corpus was not a product of Magna Carta, the right which underpins it – that is, the right not to be unlawfully detained – was recorded there. As Lord Wilson observed in *Lee-Hirons v Secretary of State for Justice* [2016] UKSC 46; [2017] AC 52 at [23]: "We can be proud of the fact that, even in the dark ages, our law recognised the need for strict control of a deprivation of liberty: "no free man", so King John was obliged to concede in clause 39 of Magna Carta (9 Hen 3), "is to be arrested, or imprisoned … nor will we go against him or send any against him, except by the lawful judgment of his peers or by the law of the land"". See also Lord Bingham's reference to Magna Carta in a similar context in *R (Von Brandenburg) v East London and the City Mental Health NHS Trust* [2003] UKHL 58; [2004] 2 AC 280 at [6].

[3] To take one seventeenth century example, in *Sir Francis Barrington's Case* (1610) 8 Co Rep 136b, 138; 77 ER 681, 684, the Court of Common Pleas stated that "when an Act makes any conveyance good against the King, or any other person or persons in certain, it shall not take away the right of any other, although there be not any saving in the Act." *Barrington's Case* was cited in *Western Counties v Windsor and Annapolis* (1882) 7 App Cas 178, 188, which is one of a number of cases where the courts have held that an Act of Parliament must not be taken to extinguish rights of property, unless it appears, by express words or by plain implication, that it was the intention of Parliament to do so. For a more recent statement of that principle, see *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 363 (per Lord Scarman).

[4] (1765) 2 Wils KB 275; 95 ER 807.

[5] [2001] UKHL 26; [2001] 2 AC 532.

> "[W]hile this case has arisen in a jurisdiction where the European Convention for the Protection of Human Rights and Fundamental Freedoms applies… it is of great importance, in my opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice. Thus the decision may prove to be in point in common law jurisdictions not affected by the Convention. Rights similar to those in the Convention are of course to be found in constitutional documents and other formal affirmations of rights elsewhere. The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them."[6]

6. Similarly, when the House of Lords rejected the admission of evidence obtained by torture in *A v Secretary of State for the Home Department*[7], it did so on the basis of the common law: Lord Bingham observed that English common law had regarded torture and its fruits with abhorrence for over 500 years,[8] and concluded that the principles of the common law, standing alone, compelled the exclusion of third party torture evidence. He noted that that was consistent with the Convention.[9]

7. The Supreme Court has taken much the same approach in a number of cases. One example is *S v L*[10], a family law appeal concerned with legislation under which the court can dispense with parental consent to adoption. The Supreme Court was asked to interpret the legislation compatibly with article 8 of the Convention, in accordance with section 3 of the HRA, and was referred to numerous ECtHR cases by the parties. In the majority judgment, which I delivered, I found it unnecessary to use section 3 of the HRA, emphasising that common law principles of statutory interpretation require legislation to be interpreted in accordance with the fundamental values of our society, values which include respect for the rights of parents.[11] I explained, however, why the result arrived at under our domestic law was also in conformity with Convention rights.[12]

[6] At [30].
[7] [2005] UKHL 71; [2006] 2 AC 221.
[8] At [51].
[9] At [52]. See also *R (West) v Parole Board* 2005] UKHL 1; [2005] 1 WLR 350.
[10] [2012] UKSC 30; [2012] Fam LR 108.
[11] At [33]-[34].
[12] At [38]-[49].

8. Another example is *Osborn v Parole Board*[13], which concerned the right to a fair hearing before the Parole Board. The submissions of the parties focused on article 5(4) of the Convention, and paid comparatively little attention to domestic administrative law. In the judgment of the Supreme Court, which I delivered, I explained that that approach does not properly reflect the relationship between domestic law and Convention rights. It is wrong to suppose that because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem should begin and end with the ECtHR case law. Properly understood, Convention rights do not form a discrete body of domestic law derived from the judgments of the ECtHR.[14] As Lord Rodger once observed, "it would be wrong… to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth they soak through and permeate the areas of our law in which they apply".[15] Accordingly, whilst I acknowledged in my judgment that the HRA is of unquestionable importance, not least because domestic law may sometimes fail to fully reflect the requirements of the Convention, I made clear that "[h]uman rights continue to be protected by our domestic law, interpreted and developed in accordance with the [HRA] when appropriate."[16]

9. In *Kennedy v Charity Commission*[17], it was argued on behalf of the Appellant journalist that certain exemptions from the duty of disclosure imposed on the Charity Commission under the Freedom of Information Act should be interpreted restrictively in order to comply with article 10 of the Convention. The Supreme Court rejected that argument. Lord Mance observed that there "has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights", despite there being an expectation, "especially in view of the contribution which common lawyers made to the Convention's inception… [that Convention rights will,] at least generally even if not always, reflect and… find their homologue in the common or domestic statute law."[18] So, rather than turning first to the ECtHR case law, "the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene."[19] The statutory scheme under which the Charity Commission exercised its functions was underpinned by a common law presumption in favour of openness.[20] In certain circumstances, this meant that it had a duty to disclose documents in the public interest. A majority of the Court

[13] [2013] UKSC 61; [2014] AC 1115. See also the earlier case of *West v Parole Board*
[14] At [63].
[15] *HM Advocate v Montgomery* 2000 JC 111, 117.
[16] At [57].
[17] [2014] UKSC 20; [2015] AC 455.
[18] At [46].
[19] At [46].
[20] At [47] (per Lord Mance) and [126] (per Lord Toulson).

considered that there was therefore no need to look to the Convention. It did not add anything to the rights already enshrined in domestic law.[21]

10. In *A v BBC*[22], the Supreme Court was asked to identify the legal basis of, and limitations to, the courts' power to preserve the anonymity of parties to proceedings before them. It was argued on behalf of the BBC that, where Convention rights were engaged, any common law power which might previously have been exercised by the courts had been superseded by the Convention rights. In the judgment of the Court, which I delivered, I explained that that was not correct. I explained that "the common law principle of open justice remains in vigour, even when Convention rights are also applicable"[23], such that "the starting point in this context is the domestic principle of open justice, with its qualifications under both common law and statute."[24] I pointed out that the application of that principle "should normally meet the requirements of the Convention, given the extent to which the Convention and our domestic law in this area walk in step, and bearing in mind the capacity of the common law to develop".[25] In respect of the type of anonymity order at issue, the common law, the applicable domestic legislation and the Convention did indeed walk in step. All three had been complied with on the facts of the case.

11. More recently, in *R (Unison) v Lord Chancellor*[26], the Supreme Court held that fees imposed on those wishing to bring claims to the Employment Tribunal effectively prevented access to justice and were therefore unlawful. In the judgment of the Court, which I delivered, I explained that "the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law".[27] The case was argued and decided primarily on the basis of that long-recognised common law right. The Convention played only a supporting role.[28]

12. Once set against the context of those cases, it is evident that the HRA, and the Convention rights to which it gives effect, should not be regarded as exotic interlopers sitting apart from the common law. Human rights continue to be protected principally by our domestic law, interpreted and developed in accordance with the HRA when appropriate.

---

[21] At [40] (per Lord Mance) and [133] (per Lord Toulson).
[22] [2014] UKSC 25; [2015] AC 588.
[23] At [56].
[24] At [57].
[25] At [57].
[26] [2017] UKSC 51; [2020] AC 869.
[27] At [64]. See also references to Magna Carta, Coke and Blackstone at [74]-[75].
[28] The Convention was considered only in the context of an argument based on EU law: see [89], [106], [108]-[110], [112]-[115].

13. All this is understood by the ECtHR. It has often referred to "the fundamentally subsidiary role of the Convention".[29] It has made clear that, in order for there to be compliance with the Convention guarantees, there must in the first place be compliance with the relevant rules of domestic law.[30] It knows very well that there are important differences between the various societies across Europe and their legal systems. Rather than seeking to construct a uniform code to be adopted by the 47 contracting states, the ECtHR recognises that the way in which they choose to comply with the Convention may legitimately vary.

14. In the United Kingdom, enacting the HRA is one way in which Parliament has chosen to promote compliance with the Convention. I considered the nature and effect of that choice in some detail in my first response to the call for evidence.[31] With this postscript, I hope that Parliament's choice is also properly understood as one which supports, rather than supplants, the development of our own domestic tradition of human rights protection.

[29] See e.g. *Hatton and Others v United Kingdom* (2003) 37 EHRR 28 at [97] and *Gard v United Kingdom* (2017) 65 EHRR SE9 at [71].

[30] See e.g. *Koendjbiharie v Netherlands* (1991) 13 EHRR 820 at [27].

[31] This postscript is not intended to detract from anything in my first response to the call for evidence. In particular, notwithstanding our longstanding parliamentary and judicial commitment to the protection of human rights, it is important to recognise that there are situations where our ordinary domestic law does not meet Convention requirements, and where the deficiency cannot be made good by the courts without recourse to the HRA. In that event, the HRA provides additional tools to enable the courts to ensure that the law develops in line with the Convention rights to which Parliament has given effect. If the HRA were to be amended in a way which reduced the ability of domestic courts to protect Convention rights to the standard required by the ECtHR, that would be liable to result in an increase in the flow of cases from the UK to the ECtHR, and an increase in the number of complaints which were upheld there.